Supreme Court, U.S.
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No. 02 134

IN THE

Supreme Court of the United States

CATHY RATLEY,

Petitioner

v.

CITY OF JACKSONVILLE,

Respondent

On Petition for Writ of Certiorari To The
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit departed from the essential requirements of law by requiring nearly identical conduct instead of comparably serious conduct to identify Title VII comparators, for purposes of establishing Petitioner's prima facie case of sex discrimination.

2. Whether the Eleventh Circuit erred by not finding an abuse of discretion by the lower court for requiring nearly identical conduct instead of comparably serious conduct to identify Title VII comparators for purposes of establishing Petitioner's prima facie case of sex discrimination.

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PETITION FOR A WRIT OF CERTIORARI

Cathy Ratley petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, affirming the United States District Court for the Middle District of Florida's decisions denying her motion to compel the production of documents and granting respondent's motion for summary judgment. Petitioner prays that this Honorable Court grant her petition, reverse the decision of the Eleventh Circuit, and remand the case for reconsideration.

OPINIONS BELOW

The Eleventh Circuit's opinion in this case is unreported and appears attached to this petition as appendix A. The district court orders denying petitioner's motion to compel and granting respondent's motion for summary judgment are unreported and appear attached to this petition as appendices B and C.

JURISDICTION

The Eleventh Circuit's decision in this matter was entered on April 22, 2002. The petitioner invokes this court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII, (42 U.S.C. §2000e, *et seq.*) prohibits employers covered by the statute from taking actions or engaging in practices that discriminate against workers or

job applicants on the basis of their race, religion, sex, or national origin. 42 U.S.C. §2000 e-2.

STATEMENT OF THE CASE

Petitioner Cathy Ratley is a former law enforcement officer with the Consolidated City of Jacksonville, Florida. The City fired her citing allegations of falsely reporting a fire and lying about the incident to internal affairs investigators. Petitioner asserts that the reason given is solely pretext for firing her because of her sex, but has been unable to amass evidence to present to the court to satisfy her *prima facie* case.

Procedural Background

Petitioner instituted this action for illegal sex discrimination under Title VII. 42 U.S.C. § 2000e, *et seq.* She claimed she was improperly fired because of her sex and that she was subjected to differential terms of employment based on her sex.

Petitioner requested that respondent produce all internal affairs documents to her for a period of ten years. Respondent objected. Petitioner properly moved the district court magistrate for an order to compel production of the requested files. That motion was wholly denied by the district magistrate. Petitioner appealed to the district court judge. The District Court judge reversed the decision of the magistrate in part and granted Petitioner access to internal affairs documents of "similarly situated" officers. In doing so, the district court judge stated that the relevant comparator pool for petitioner to search through was of law enforcement officers that engaged in the exact same conduct that petitioner allegedly did (*i.e.*, made false reports which

would necessitate the activation of emergency response teams and subsequently lied to the investigating officers). Petitioner's file was the only one to meet the district judge's limitations.

Petitioner, unable to locate similarly situated personnel outside of her class was unable to establish a prima facie case. Respondent's motion for summary judgment was granted on October 15, 2001.

On appeal, the Eleventh Circuit affirmed both decisions of the District Court.

REASONS FOR GRANTING THE WRIT

Under Title VII, a civil rights plaintiff may establish a prima facie case of sex discrimination by 1) being a member of a protected class, 2) demonstrating qualification for the job position, and 3) showing she was the subject of disparate treatment as compared to "similarly situated" persons outside of the protected class. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *Latham v. Dep't of Children and Youth Services*, 172 F.3d 786, 792 (11th Cir. 1999). Demonstrating a prima facie case is not onerous, rather it only requires that a plaintiff provide enough evidence to permit an inference of discrimination. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). At the summary judgment stage, the burden of establishing a *prima facie* case is minimal. *St. Mary's Honor Ctr.*, 509 U.S. at 506.

The central controversy in this matter revolves around the district court's interpretation of the phrase "similarly situated" and its corresponding order limiting discovery. By limiting discovery, petitioner could not properly locate potential Title VII comparators and thus could not meet her "minimal" burden during summary judgment proceedings. Petitioner contends that the Eleventh Circuit's limitation of her discovery departed from the essential requirements of law by the application of a legal definition in direct conflict with the holdings of this Court, and in direct conflict with other circuit court holdings. In the alternative, the petitioner contends that the Eleventh Circuit's affirmation of the district court was an abuse of its discretion.

I. THE STANDARD APPLIED BY THE DISTRICT COURT AND AFFIRMED BY THE CIRCUIT COURT TO CREATE THE POTENTIAL COMPARATOR POOL DURING DISCOVERY IS DIRECTLY IN CONFLICT WITH THIS COURT'S PRIOR CASE LAW.

Title VII actions are litigated under the burden shifting analysis articulated in the now famous landmark case of *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973). In *McDonnell-Douglas*, this Court stated that a Title VII plaintiff may use evidence that persons outside of her protected class were not treated in a similar fashion. *Id.* at 804. In speaking on Green's ability to prove McDonnell-Douglas' actions pretextual, the Court said:

> Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of *comparable seriousness* to the [conduct in question] were nevertheless retained or rehired.

Id. (emphasis added). Three years later in *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976), this Court affirmed that the correct test for identifying "similarly situated" persons for comparison is by looking to the comparable seriousness of the plaintiff's accused misdeeds and the potential comparators.[1] These two cases, read together and in harmony with the *Burdine / St. Mary's* minimal-burden standard for proof of a *prima facie* case, indicate that a Title VII plaintiff need only put on a showing of evidence that potential comparators were accused of comparably serious misdeeds and yet treated differently.

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[1] "[P]recise equivalence in culpability between employees is not the ultimate question." *McDonald*, 427 U.S. at 283, n. 11.

Under the Eleventh Circuit's decision however, petitioner cannot meet her "minimal" burden of showing a *prima facie* case because, as a direct result of the district court's denial of petitioner's motion to compel discovery, she cannot identify comparators that have been accused of the exact same conduct she has been accused of. This heavy burden in identifying potential comparators is placed on the petitioner, even though petitioner was dismissed from her position under rules of general applicability (The Eleventh Circuit's opinion states that the City charged her with conduct unbecoming of an officer. The Eleventh Circuit's application of a rogue "similarly situated" standard in which a Title VII plaintiff must show *nearly identical* conduct is contrary to the intentions of this Court as expressed in *McDonnell-Douglas* and in *McDonald*. (Even more so given its decision to dispense of petitioner's case in an unpublished opinion while the published law of the circuit is in chaos. *See* Reason III, *infra*, pg. 15.) As such, the writ must be granted and the decision of the Eleventh Circuit reversed.

II. SIX CIRCUITS ARE IN DIRECT CONFLICT AS WHETHER TO APPLY A NEARLY IDENTICAL STANDARD OR A COMPARABLY SERIOUS STANDARD.

The Third, Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits are in direct conflict over which standard to apply to determine "similarly situated" comparators. The Fifth and District of Columbia Circuits utilize an express "nearly identical" standard; the Seventh and Eighth Circuits use what practically amounts to an implied "nearly identical" standard, and the Third and Tenth Circuits use a "comparably serious" or implied "comparably serious" standard.

The key difference between the two "styles" of case law, "nearly identical" and "comparably serious" is that "nearly identical" circuits tend to leave out the "rough comparison" and "reasoned analogy" that is typically found in "comparably serious" jurisdictions. "Nearly identical" circuits use factual similarities or dissimilarities to determine the appropriate result. *Compare Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212 (5th Cir. 2001) *with Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13 (1st Cir. 1989)

A. Express "Nearly Identical" Circuit Law

Express "nearly identical" circuits expressly use the "nearly identical" standard in their case law to determine a Title VII plaintiff's potential comparators. In these circuits, a decision requiring petitioner to identify comparators that engaged in the exact same conduct that petitioner allegedly did would fall in line with established precedent.

The Fifth Circuit's recent decision in *Wallace v. Methodist Hospital Systems*, directly affirmed the use of the

"nearly identical" standard:

> We have held that in order for a plaintiff to show disparate treatment, she must demonstrate "that the misconduct for which she was discharged was nearly identical to that engaged in by a[n] employee [not within her protected class] whom [the company] retained."

271 F.3d at 221(quoting *Smith v. Wal-Mart Stores (No. 471)*, 891 F.2d 1177, 1180 (5th Cir. 1990)). *See also Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1089 (5th Cir.1995); *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir.1991); *Davin v. Delta Air Lines, Inc.*, 678 F.2d 567, 570 (5th Cir. 1982). The phrase "essentially identical" has also been used to describe the similarly situated standard. *Barnes v. Yellow Freight Sys., Inc.*, 778 F.2d 1096, 1101 (5th Cir.1985). In *Wallace*, the Fifth Circuit held that a pregnant nurse who performed a procedure without a doctor's orders could use a single nonpregnant nurse as a comparator.

> Wallace does, however, provide an example of a non-pregnant nurse that performed almost the exact procedure Wallace performed without having received a doctor's order. Although she did not first remove a Salem Sump, Cheryl Gray ("Gray") inserted a nasogastric tube without having received a doctor's order to do so. Further, the patient's doctor did not want a tube inserted because the patient had recently had surgery in the area where the tube was placed. Hahus and Schmitz supervised Gray. Schmitz and Hahus did not terminate Gray for her actions; instead, they only verbally reprimanded her.

Wallace, 271 F.3d at 221. In essence, the only comparator available to Wallace was one that did the same things she did.

The District of Columbia circuit uses this same highly factual "nearly identical" inquiry, although dressed up in "comparably serious" clothing, in its similarly situated rulings. In *Holbrook v. Reno*, 196 F.3d 255, 261-62 (D.C. Cir. 1999), a female FBI agent trainee was unable to utilize potential comparator evidence because she could not establish that any of her identified potential comparators committed "comparably serious" conduct that was "nearly identical" in all relevant aspects. Agent trainee Holbrook was accused by the FBI of lying and disobedience and was removed from the FBI academy and placed on suspension from work. Her potential comparators were one by one dismissed including a possible comparator that had admitted to drinking before driving and a second possible comparator who had been disciplined for lying about an improper relationship with a subordinate. These potential comparators were not "nearly identical" to Holbrook and thus, not available for her use. *Id.* at 261-62.

The D.C. Circuit has also dismissed potential comparators for less. Two EPA employees with similar job descriptions but different pay grade levels were found not to be similarly situated under the "nearly identical" standard. *Barbour v. Browner*, 181 F.3d 1342 (D.C. Cir. 1999). A law firm associate terminated for failure to get along with others was not "comparably serious" (read "nearly identical") to another firm associate with legal writing problems and thus, was not similarly situated. *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995). In another law firm case, a black associate was not "nearly identical" to other sixth year associates for initial compensation purposes because he was a lateral hire and not

a "homegrown" associate. *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1554 (D.C. Cir. 1997).

B. Implied "Nearly Identical" Circuit Law

The Seventh, and Eighth Circuits use a standard for determining "similarly situated" persons that if not by express statement, amounts to a "nearly identical" test. Like express "nearly identical" circuits, a decision requiring petitioner to identify comparators that engaged in the exact same conduct that petitioner allegedly did would fall in line with established precedent.

The Seventh Circuit establishes a rigid guideline that, although not expressly a "nearly identical" test, works its way out to be one. The circuit has used the words "substantial similarity" before in *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 618 (7th Cir. 2000), and stated only two months ago:

> ... [A] plaintiff must show that he is similarly situated with respect to performance, qualifications and conduct. Such a showing normally entails establishing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them.

Snipes v. Illinois Dep't of Corr., 291 F.3d 460, 463 (7th Cir. 2002)(internal citations and quotations omitted). In *Snipes*, a potential comparator to the plaintiff that held the same job position, was subjected to the same evaluation process, worked for the Department during the same time frame, was

subjected to the same attendance policy, and was exposed to the same disciplinary process for violations was not similarly situated solely because the potential comparator had a different supervisor. *Id.*

> Different employment decisions, concerning different employees, made by different supervisors, are seldom sufficiently comparable to establish a prima facie case of discrimination for the simple reason that different supervisors may exercise their discretion differently.

Radue, 219 F.3d at 618. As can be seen from the Seventh Circuit's view of similarly situated comparators, regardless of the comparable seriousness of the incidents, so long as some innocuous differing factor such as a different supervisor is present, a plaintiff can never present a similarly situated comparator. *See also Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002).

The Eighth Circuit is in the same posture. First, contrary to the "minimal" standard for a *prima facie* case, the Eighth Circuit requires a plaintiff to provide "rigorous" proof of comparability to introduce similarly situated evidence. *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994). Indeed, according to established Eighth Circuit precedent, the correct test to utilize is a "similarly situated in all relevant aspects" query that more often than not amounts to a "nearly identical" examination. *See generally Smith v. Monsanto Chem. Co.*, 770 F.2d 719, 723-24 (8th Cir. 1985)(reversing a district court finding of discrimination where the plaintiff was disciplined for personal use of rag towels for non-job-related tasks while others in his exact circumstances (employed for 3 ½ years and not accused of theft) outside of his class were not);

Meyer v. Ford Motor Co., 659 F.2d 91, 93-94 (8th Cir. 1981)(plaintiff was not similarly situated to other dealership owners outside of his class because he owned his dealership for two years and the potential comparator owned his dealership for six); *Cronquist v. City of Minneapolis*, 237 F.3d 920, 928 (8th Cir. 2000)(stating that under a "comparably serious" test plaintiff still must prove similarity in "all relevant aspects" and finding officer plaintiff not similarly situated because plaintiff was unable to find another officer charged with three harassment charges and comparables' unstated conduct was not "comparably serious"); *But cf. Lanear v. Safeway Grocery*, 843 F.3d 298, 301-2 (8th Cir. 1988)(using a "comparably serious" test and finding plaintiff accused of participating in a time card violation scam not similarly situated to potential comparator accused of only one time card violation) *and Lynn v. Deaconess Med. Ctr.-West Campus*, 160 F.3d 484, 488 (8th Cir.1998)(stating that a requirement that employees engage in the same offense is unwise).

C. True "Comparably Serious" Circuit Law

The Third and Tenth Circuits use a test that in line with a "comparably serious" analysis.

In *McAlester v. United Air Lines*, 851 F.2d 1249, 1261 (10th Cir. 1988), a Tenth Circuit case, an air line pilot claimed discriminatory application of the company's disciplinary policy. Citing to *McDonald v. Santa Fe Trail Transport Co.*, the circuit court held that the plaintiff's potential comparator evidence was allowable.

> The fact that these other employees did not commit the exact same offense as McAlester, does not prohibit consideration of their testimony. It is sufficient if these employees

did acts of comparable seriousness.

Id.; *See McDonald*, 427 U.S. at 283 n.11.

The Tenth Circuit has generally consistently applied the comparably serious test. *See generally EEOC v. Flasher Co.*, 986 F.2d 1312 (10th Cir. 1990)(holding that infractions giving rise to the comparison need not involve exactly the same offenses); *Kendrick v. Penske Serv.*, 220 F.3d 1220 (10th Cir. 2000)(finding plaintiff's comparators not similarly situated, but affirming the rule that comparisons need not be based on identical violations of identical work rules); *But cf. Aramburu v. Boeing Co.*, 112 F.3d 1398 (10th Cir. 1997)(using the "comparably serious" test, but citing a line of authority beginning in the Second Circuit, at the time a "same or similar circumstances" / "nearly identical" jurisdiction)

Indeed, the Third Circuit has applied the comparably serious test in petitioner's circumstances. Speaking on a matter involving a district court's limitation of a plaintiff's discovery ability to those comparators in the plaintiff's exact situation, the circuit court said:

> San Filippo and the Rutgers AAUP argue that the district court's definition of "similarly situated" was too narrow. We agree. Among other things, San Filippo argues that, but for his [First Amendment] protected activity, he would not have been charged at all. To limit his discovery to individuals who were in fact brought up on similar charges is, therefore, not adequately responsive to San Filippo's needs. Nor should San Filippo be limited to discovery of individuals who committed nine charges of comparable seriousness yet were

> not disciplined. ... As [the Supreme Court] indicated in *McDonnell-Douglas Corp. v. Green*, an allegation that other "employees involved in acts against [the employer] of comparable seriousness ... were nevertheless retained ..." is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext.

San Filippo v. Bongiovanni, 30 F.3d 424, 433 (3d Cir. 1994).

Consequently, this Court should grant a writ of certiorari in this matter to the petitioner and resolve this conflict of law in the circuits.

III. FIVE CIRCUITS HAVE INTERNAL CONFLICTS OVER WHICH APPLICATION, NEARLY IDENTICAL OR COMPARABLY SERIOUS, IS THE APPROPRIATE ONE TO USE.

The First, Second, Fourth, Sixth, Tenth, and Eleventh Circuits are all embroiled in inner dispute over whether to use the "nearly identical" test or the "comparably serious" test.

The First Circuit has a hybrid "all relevant aspects" test that appears to place the circuit on the "nearly identical" side (the critical case of *Dartmouth Review* cites the Eighth Circuit's *Smith v Monsanto Chemical Co.* "all relevant aspects" test as precedent). *Dartmouth Review*, 889 F.2d at 19. But, there is "softening" language in the First's case law asking courts to do nothing more than require "apples to be compared apples." *Dartmouth Review*, 889 F.2d at 19. Indeed, cases show that the First Circuit at times uses a comparably serious analysis and at other times uses a more nearly identical analysis, even in the same case.

In *Molloy v. Blanchard*, 115 F.3d 86, 91 (1st Cir. 1997), the First Circuit stated that the appropriate test to use is "whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated." The court goes on to say that "exact correlation is neither likely nor necessary, but the cases must be fair congeners." *Id.*

However, in *Conward v. Cambridge School Committee*, 171 F.3d 12, 20 (1st Cir. 1999), the First Circuit seemed to show a conflict in its reasoning within the same case. The teacher plaintiff identified three comparators that he believed were similarly situated to him. Showing a "comparable seriousness" approach, the court found that

two of the comparators, both of whom were accused of physical violence, did not match up in seriousness with the plaintiff accused of sexual harassment. *Id.* However, in a strikingly "nearly identical" switch, the court found that the third potential comparator was not similarly situated solely because the alleged comparator did not admit to improper sexual conduct while the plaintiff did. *Id.*

Recent cases from the Second Circuit have revealed an internal dispute over which law to apply. In *Shumway v. United Parcel Service*, 118 F.3d 60, 64 (2d Cir. 1997), the Second Circuit approved without discussion the case of *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992), a Sixth Circuit case that has long been the cornerstone of "nearly identical" case law (and one from which the Sixth Circuit has recently backed away).

However more recently in *Graham v. Long Island Railroad*, 230 F.3d 34 (2d Cir. 2000), the court discussed at length the prior *Shumway* test of "similarly situated in all material aspects," but eventually settled on applying a comparably serious test[2]. *See also McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001)(holding that the *Shumway* standard was not a nearly identical rule).

The Fourth Circuit interestingly has approved of the "comparably serious" test as far back as 1985, but in a series of unreported cases has applied that test in a very inflexible way tending to lead one to think that in general application the Fourth Circuit is unsure of which standard to use. *Compare Moore v. City of Charlotte*, 754 F.2d 1100, 1107 (4th

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[2] The *Graham* court found that the standard for comparing conduct requires a "reasonably close resemblance" rather than an "identical showing." *Graham*, 230 F.3d at 39.

Cir. 1985)(stating that the correct test to use when evaluating potential comparators is a comparable seriousness test) *with Austen v. HCA Health Serv. of Va.*, 5 Fed. Appx. 253 (4th Cir. Mar. 12, 2001)(holding that plaintiff was not similarly situated because he had more supervisory authority and had a record of incidents) *and Weeks v. Union Camp Corp.*, 2000 WL 727771 (4th Cir Jun. 7, 2000)(distinguishing between plaintiffs and potential comparator because plaintiffs admitted to conduct while comparator did not); *and Edwards v. Newport News Shipbuilding and Dry Dock Co.*, 1998 WL 841567 (4th Cir. Dec. 7, 1998)(holding that plaintiff's identified comparators, guilty of the same offense, were not similarly situated because each occurred under different or mitigating circumstances).

The Sixth Circuit, originating court of *Mitchell v. Toledo Hospital* case, has recently retreated from its hard "nearly identical" stance and has adopted a more lenient "comparable seriousness" rationale. In a more recent case, the court stated that it is improper to

> invite a comparison between the employment status of the plaintiff and other employees in every single aspect of their employment. ... Courts should not assume ... that the specific factors discussed in *Mitchell*, [that the comparator must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct,] are relevant factors in cases arising under different circumstances. ... Instead, courts should make an independent determination of the factors relevant to each case.

Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir.1998)(internal quotation marks removed).

The Eleventh Circuit, home circuit of the petitioner, has been in turmoil for years over whether the correct test to use is "nearly identical" or "comparably serious." In *Manccia v. Brown*,171 F.3d 1364 (11th Cir. 1999) and *Jones v. Bessemer Carraway Medical Center*, 137 F.3d 1306 (11th Cir. 1998), the court has issued "nearly identical" opinions.

> We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges.

Manccia, 171 F.3d at 1368.

> The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed .

Bessemer Carraway Med. Ctr.,137 F.3d at 1311. *See also Jones v. Gerwins*, 874 F.2d 1534, 1540 n. 9 (11th Cir. 1989)(holding that the misconduct for which the comparator is charged must be nearly identical to the plaintiff's)(quoting *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1185 (11th Cir. 1984)).

More recently though, the circuit has issued opinions leaning towards the comparably serious approach, In both *Alexander v. Fulton County*, 207 F.3d 1303 (11th Cir. 2000), and *Anderson v. WBMG-42*, 253 F.3d 561 (11th Cir. 2001), the court has rejected a nearly identical conduct standard.

> In arguing that the conduct of comparator employees must be the same or nearly identical, [the defendant] takes the same position rejected by this Court in [*Alexander*] ... the law does not require that a "similarly situated" individual be one who has engaged in the same or nearly identical conduct" as the disciplined plaintiff. Instead, the law only requires similar misconduct from the similarly situated comparator.

Anderson, 253 F.3d at 564-65.

However, the circuit still has the lingering effects of nearly identical case law in its history and attempted again to affirm it in a very recent case. *Silvera v. Orange County School Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001)("In order to satisfy the similar offenses prong, the comparator's misconduct must be nearly identical to the plaintiff's in order to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges.")(quoting *Manccia*).

In light of the chaos in a sizable number of the circuits, the Court should grant the Petitioner's petition and issue a writ of certiorari to guide the lower circuit courts.

CONCLUSION

Because of the foregoing, this honorable Court should grant the petition for writ of certiorari to resolve this complex issue of substantive Title VII law and to articulate the standard for identifying similarly situated comparators under Title VII.

Respectfully submitted,

Richard E. Johnson
Counsel of Record
314 W. Jefferson Street
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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 22, 2002

IN THE UNITES STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-16291
Non-Argument Calendar

D. C. Docket No. 00-00384-CV-J-21

CATHY D. RATLEY,

Plaintiff-Appellant

versus

CITY OF JACKSONVILLE,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

(April 22, 2002)

Before TJOFLAT, BIRCH and WILSON, Circuit Judges.

PER CURIAM:

Cathy D. Ratley, a former law enforcement officer with the City of Jacksonville, brought this employment discrimination action against the City under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981a, and the Florida Civil Rights Act, Fla. Stat.§§ 760.01 - 760.11. On appeal,

Ratley contends that the district court erred in the following two respects: (1) denying her motion to compel the production of documents; and (2) granting summary judgment to the defendant. For the following reasons we affirm.

BACKGROUND

The City contends that Ratley was terminated for falsely reporting a fire and then lying about her actions during the subsequent internal affairs investigation.[1] Ratley claims that she was treated differently than similarly situated male and black employees and that this treatment adversely affected her employment and resulted in her eventual termination.

Shortly after filing her complaint, Ratley served upon the City a litany of requests to produce documents. Ratley requested a broad range of documents including all internal affairs investigation files held by the City over the previous decade and all internal affairs files, data base entries, and personnel files for a list of specific city employees. The City complied with some of the requests and objected to the remaining. The City argued that the remaining requests were unduly burdensome and overbroad.

Ratley then filed a motion to compel the production of the remaining documents. She argued that the document

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[1] Ratley was terminated at the conclusion of an investigation in which the City found that Ratley had violated the following sections of the City's Disciplinary Action Guide: (1) General Order XI.4.I.A.2 (Violation of the Law); (2) General Order XI.4.I.A.3.c (Departure from the Truth); and (3) General Order XI.4.I.A.3.d (Conduct Unbecoming).

production was necessary for her to establish a prima facie case of discrimination, because the documents would allow her to produce similarly situated employees outside her class that were treated more favorably by the City. The magistrate judge, finding the requests overbroad, denied the motion to compel. Ratley then appealed the magistrate judge's findings to the district court.

The district court overruled in part the magistrate's findings. The district court disagreed with Ratley's contention that the comparator pool from which she could discover should be comprised of individuals alleged to have violated any law, excepting misdemeanors. The court found that the relevant comparator pool in the case should consist of law enforcement officers who had both (1) made false reports which would necessitate the activation of emergency response teams; and (2) subsequently lied to the investigating officers. The court ordered the City to conduct a search of its database to identify and produce any and all internal affairs files that corresponded to the relevant comparator pool parameters the court had established. After conducting the search, only Ratley's file met the court's criteria.

The district court subsequently granted the City's motion for summary judgment. Ratley did not identify any single similarly situated individual who was treated more favorably. Therefore, the court found that Ratley failed to establish a prima facie case of discrimination. The appeal followed.

DISCUSSION

Ratley initially argues that the district court erred in denying her motion to compel the production of documents. We review the denial of Ratley's motion to compel for abuse

of discretion. *Hinson v. Clinch County*, 231 F.3d 821, 826 (11th Cir. 2000). Moreover, district courts are granted wide latitude over the management of discovery related matters. *Johnson v. Bd. Of Regents*, 263 F.3d 1234, 1269 (11th Cir. 2001).

In this discrimination case, Ratley had the initial burden of establishing her prima facie case. She was required to demonstrate (1) that she belonged to a class protected under Title VII; (2) that she was qualified for the job; and (3) "that the misconduct for which the employer discharged the plaintiff was the same or similar to what a similarly situated employee engaged in, but that the employer did not discipline the other employee similarly." *Lathem v. Dept. of Children and Youth Servs.*, 172F.3d 786, 792-93 (11th Cir. 1999).

The question presented revolves around how broadly Ratley should be permitted to discover documents in her effort to find a sufficient comparator to meet her prima facie requirements. Ratley contends that she should have access to an expansive collection of internal affairs and personnel records to locate a similarly situated comparator. The City responds that Ratley's initial document requests were "offensively overbroad." The City argues that the district court correctly and reasonably determined the comparator parameters within which Ratley could discover documents. We agree.

Recognizing that discovery has "ultimate and necessary boundaries." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978), we find no abuse of discretion in the district court's decision to limit Ratley's document production requests. The prima facie burden required Ratley to produce evidence that another similarly situated employee engaged in the same or similar conduct as her but

was not comparably disciplined. *Lathem*, 172 F.3d at 792-93. For this reason, the district court limited the scope of discovery to similar employees who had potentially engaged in similar misconduct. Because the discovery parameters laid out by the district court did not produce any suitable comparators does not mean that the parameters were too narrowly limited. It simply means that there were not suitable comparators for Ratley to use in her case. We therefore find no abuse of discretion.

Ratley next argues that the district court erred when it granted summary judgment in favor of the City. We review de novo district court grants of summary judgment. *Hinson*, 231 F.3d at 826. In reviewing a grant of summary judgment, we are to draw all reasonable inferences in favor of the nonmoving party and may not weigh the evidence. *Id.* at 826-27. We are to "give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.* at 827 (internal quotation marks omitted).

The district court correctly ruled that the City was entitled to summary judgment. As part of Ratley's initial prima facie showing, she was required to produce a similarly situated employee who was treated differently than she. Ratley could not meet this burden for she did not produce a single potential comparator. Having found that the district court correctly ruled on Ratley's motion to compel the production of documents, we find no error in the grant of summary judgment to the City.

CONCLUSION

Accordingly, after a review of the record and upon

consideration of the briefs, we hold that the district court did not abuse its discretion in limiting Ratley's discovery requests. Furthermore, the district court did not err in granting the City summary judgment. We therefore AFFIRM.

APPENDIX B- OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA DATED AND FILED OCTOBER 15, 2001

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO. 3: 00-cv-384-J-21HTS

CATHY D. RATLEY,

Plaintiff,

v.

CITY OF JACKSONVILLE,

Defendant.
_____/

ORDER

This cause is before the Court on Defendant City of Jacksonville's Motion for Summary Judgment (Dkt. 25). The Plaintiff filed a response in opposition thereto (Dkt. 28).

I. Factual & Procedural Background

The Plaintiff, a white female, filed a two (2) count Complaint (Dkt. 1) alleging both gender and race discrimination in violation of Title 42 United States Code ("U.S.C.") § 2000e *et seq.* ("Title V11"), Title 42 U.S.C. § 1981a, Title I of the Civil Rights Act of 1991 and Chapter

760, Florida Statutes, ("Florida Civil Rights Act")[2].

The Plaintiff was employed by the Defendant as a law enforcement officer. The Defendant contends it terminated the Plaintiff's employment after conducting an investigation into an allegation that the Plaintiff had violated § 806.101, Florida Statutes, by making a false report of a fire to emergency telephone operators. Allegedly, the Plaintiff was involved in a spat with a former paramour who was employed as a fireman. The location of the "fire" was such that the former paramour was one of the firefighters that was dispatched to the scene.

The Defendant further avers that, during the course of its investigation, the Plaintiff responded untruthfully

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[2] For clarification purposes, 42 U.S.C. § 1981a codifies Title I of the Civil Rights Act of 1991, and addresses damages in cases of intentional discrimination. The Court further notes that Paragraph No. 25 of the Plaintiffs Complaint (Dkt. 1) alleges a violation of Title 42 U.S.C. § 1981. That statement contradicts both the preamble of the Plaintiff's Complaint as well as the parties' Joint Pre-Trial Statement (Dkt. 39), which only allege violations of Title VII and the Florida Civil Rights Act. Despite the ambiguity, the Court's analysis infra is nonetheless case dispositive because the procedure utilized for resolving Title VII claims is identical to the one used for resolving § 1981 causes of action. Turnes v. AmSouth Bank, NA, 36 F.3d 1057, 1060 (11th Cir. 1994). Furthermore, the Florida Supreme Court has held that decisions interpreting Title VII are applicable when resolving claims made pursuant to the Florida Civil Rights Act. Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998), Ranger Ins. Co. v. Bat Harbour Club Inc., 549 So.2d 1005, 1009 (Fla. 1989).

when confronted with the misconduct. The Defendant concluded its investigation by finding that the Plaintiff had violated the following sections of the Defendant's Disciplinary Action Guide: 1) General Order XIA.I.A.2 (Violation of the Law); 2) General Order XI.4.I.A.3.c (Departure from the Truth); and 3) General Order XI.4.I.A.3.d (Conduct Unbecoming). As a result of those findings, the Plaintiff's employment was terminated.

Notably, the Plaintiff does not dispute the validity of the Defendant's charges of misconduct for purposes of resolving this Motion. Nevertheless, the Plaintiff believes she should prevail on her claims because she was treated differently than her similarly situated male and black peers.

In addition to filing her response in opposition to the Defendant's Motion for Summary Judgment, the Plaintiff simultaneously submitted a Motion to Stay Consideration of Summary Judgment Pending Receipt of Documents (Dkt. 27). At the time the Plaintiff filed her Motion to Stay (Dkt. 27), her Motion to Compel Discovery (Dkt. 23) regarding the disputed documents remained at issue. Subsequently, the Magistrate Judge issued an Order resolving the Plaintiff's Motion to Compel Discovery (Dkt. 33), which resulted in the Plaintiff filing an Objection to the Magistrate Judge's Order and Motion to Stay Consideration of Summary Judgment (Dkt. 35).

This Court ultimately sustained some of the Plaintiff's objections to the Magistrate Judge's Order and directed the Defendant to conduct a search of its data base and identify all law enforcement officers that had made both: 1) false statements; and 2) subsequent untruthful statements during the course of the following investigation (Dkt. 42). In due course the Defendant filed a notice indicating that it had been unable to locate any records

satisfying the search criteria established by the Court (Dkt. 45). Finally, despite being given leave to amend her response in opposition to the Defendant's Motion for Summary Judgment, the Plaintiff did not file any additional documents.

II. Defendant's Argument

The Defendant asserts that it is entitled to summary judgment because the Plaintiff cannot establish a *prima facie* case. Specifically, the Defendant contends the Plaintiff fails to identify any individuals that were similarly situated to the Plaintiff and received different treatment. Furthermore, the Defendant avers there is no additional evidence, either direct or circumstantial, to support a claim of gender or race discrimination.

III. Pertinent Legal Principles & Analysis

A. Summary Judgment Standard

Summary judgment is appropriate only when a court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In making this determination, a court must view all the evidence in the light most favorable to the non-moving party. *See* Samples on Behalf of Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir., 1988). The burden of establishing the absence of a genuine issue is on the moving party. See Celotex Corp. v. Catrett, 477 U.S. 317,106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). However, the burden extends only to facts that might impact the outcome of the suit under the governing law. "The substantive law will identify which facts are material ... Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986). Once this burden is met, Rule 56(e), Federal Rules of Civil Procedure, requires that the non-moving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' [and] designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 106 S.Ct. at 2553, 91 L.Ed.2d at 274. "The mere existence of a scintilla of evidence in support of the plaintiffs position is not sufficient to successfully oppose summary judgment; there must be evidence on which thejury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252,106 S.Ct. at 2512, 91 L.Ed.2d at 214, (holding a dispute over a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party). See also Samples, 846 F.2d at 1330. Title 42 U.S.C. § 1981(b).

B. Title V11 of the Civil Rights Act of 1964

Title 42 U.S.C. § 2000e-2 states in relevant part:

> (a) Employer practices. It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ....

In pursuing a Title VII cause of action, a Plaintiff may satisfy her burden of producing evidence sufficient to create a genuine issue as to a material fact by producing direct evidence, circumstantial evidence, or a statistical pattern, of evidence. Standard v. A.B.E.L. Serv., Inc., 161

F.3d 1318, 1330 (11th Cir. 1998). In the case *sub judice*, the Plaintiff does not assert the existence of either direct or statistical evidence; therefore, the Court's analysis will focus solely on whether the circumstantial evidence is. sufficient to create a genuine issue as to a material fact.

1. Circumstantial Evidence

To evaluate a Title VII claim supported by circumstantial evidence, a court uses the framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Combs v. Plantation Patterns, 106 F.3d 1519, 1527 (11th Cir. 1997). Pursuant to that framework, a plaintiff has the initial burden of establishing a *prima facie* case of discrimination. Combs, 106 F.3d at 1527-28.

One method a Plaintiff may utilize to establish a prima facie case in a wrongful termination cause of action is to show that: 1) she is a member of a protected class; 2) she was subjected to adverse employment action; 3) her employer treated similarly situated employees outside her classification more favorably; and 4) she was qualified to do the job. Maniccia v. Brown, 171 F.3d 1364, 1368 (111 Cir. 1999).

Establishment of the prima facie case creates a presumption that the employer unlawfully discriminated against the employee. Combs, 106 F.3d at 1528. The consequence of creating a presumption of discrimination "is to shift to the employer the burden of producing legitimate, nondiscriminatory reasons for the challenged employment action." Id. "However, the employer's burden is merely one of production; it 'need not persuade the court that it was

actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.'" Chapman v. AI Transp., 229 F.3d 1012,1024 (11th Cir. 2000) quoting Burdine, 450 U.S. at 254-55, 101 S.Ct. at 1094, 67 L.Ed.2d at 216. "[T]o satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Burdine, 450 U.S. at 257, 101 S.Ct. at 1096, 67 L.Ed.2d at 218. However, "[i]f the trier of fact believes the plaintiffs evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of. fact remains in the case." Burdine, 450 U.S. at 254, 101 S.Ct. at 1094, 67 L.Ed.2d at 216.

Once a defendant satisfies its burden, the presumption of discrimination created by the McDonnell Douglas framework vanishes and ... the factual inquiry proceeds to a new level of specificity. '" Combs, 106 F.3d at 1528, quoting Burdine, 450 U.S. at 255 n. 10, 101 S.Ct. at 1094-95 n. 10., 67 L.Ed.2d at 216 n. 10. "However, elimination of the presumption does not imply that the trier of fact no longer may consider evidence previously introduced to establish a prima facie case.'" Id. A plaintiff may reassert the evidence utilized to establish a prima facie case in an attempt to discredit a defendant's proffered explanation for its decision. Combs, 106 F.3d at 1528. A plaintiff may defeat a defendant's proffered explanation by "persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256, 101 S.Ct. at 1095, 67 L.Ed.2d at 217. "In other words, the plaintiff has the opportunity to come forward with evidence, including the previously produced evidence establishing the prima facie

case, sufficient to permit a reasonable fact finder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." Combs, 106 F.3d at 1528.

For purposes of summary judgment, a plaintiff may succeed if "there is sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged actions." Combs, 106 F.3d at 1529; see St. Mary's Honor Center, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Lastly, it is important to remember that the ultimate question is whether the employer intentionally discriminated. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

In this case, the ultimate question is never reached because the Plaintiff fails to establish a prima facie case. Specifically, the Plaintiff does not satisfy the requirement that the Defendant treated similarly situated employees outside her classification more favorably. The guidance from the Eleventh Circuit in Silvera v. Orange County Sch. Bd., 244 F.3d 1253 (11th Cir. 2001), is particularly instructive for purposes of resolving this Motion:

> 'In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways.' Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir.) (quoting Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)), modified by 151 F.3d 1321 (11th Cir. 1998).

> 'The most important factors in the disciplinary context ... are the nature of the offenses committed and the nature of the punishments imposed.' Id. (citations and quotations omitted). In order to satisfy the similar offenses prong, the comparator's misconduct must be nearly identical to the plaintiff s in order'to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges.'

Silvera, 244 F.3d at 1259, quoting Manicci, 171 F.3d at 1368.

The Plaintiff counters that the "nearly identical" standard is improper and argues that the proper standard is "similarly situated." Anderson v. WBMG-42, 253 F.3d 561 (11" Cir. 2001). The nuance between Silvera and Anderson may make for interesting appellate rumination; however, it is of no import to the resolution of this case. Under either standard, the Plaintiff's case is without merit because the Plaintiff could not identify a single similarly situated individual who had made a false report to emergency telephone operators (not limited merely to a false report of fire) and subsequently lied about it during the course of an investigation.

Instead, the Plaintiff attempts to satisfy her burden by pointing to a pool of comparators comprised of individuals alleged to have violated the law, excepting misdemeanors. Both Silvera and Anderson demand more similarity than offered by this Plaintiff. As noted by the Court in a previous Order in this case:

> The deliberate activation by a sworn officer of such emergency systems for improper or perverse reasons is conduct which strikes at

> the very foundation on which an ordered and peaceful community depends. Lying about such conduct in the resulting investigation is a significant aggravating circumstance which only heightens the egregiousness of the officer's conduct. Moreover, society demands that fire, rescue, and police response teams deliver immediate, speedy response - many times at the risk of life and limb. To compare the conceded actions of this Plaintiff to, for example, an officer who files a false travel claim or who batters a spouse is truly confusing apples with oranges.

Dkt. 42, page 5.

Accordingly, upon due consideration, it is ORDERED and ADJUDGED:

1. Defendant City of Jacksonville's Motion for Summary Judgment (Dkt. 25) is GRANTED and the Complaint (Dkt. 1) is dismissed with prejudice.

2. The Clerk is directed to enter judgment in favor of the Defendant City of Jacksonville and against the Plaintiff Cathy D. Ratley.

3. The Clerk is directed to close the file.

DONE AND ORDERED in Chambers at Jacksonville, Florida this 15th day of October, 2001

/s/ RALPH W. NIMMONS
United States District Judge

APPENDIX C - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA DATED AND FILED AUGUST 6, 2001

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE 140.3:00-cv-384-3-21HTS

CATHY D. RATLEY,

Plaintiff,

V.

CITY OF JACKSONVILLE,

Defendants.

_____/

ORDER

This cause comes before the Court on Plaintiff s Objections to Magistrate Judge's Order (Dkt. 35-1) and Motion to Stay Consideration of Summary Judgment (Dkt. 35-2). The Defendant filed a response in opposition thereto (Dkt. 36). At the Pretrial Conference on August 1, 200 1, the Court heard additional argument from both parties on these issues.

I. Procedural and Factual Background

In her Complaint (Dkt. 1), the Plaintiff, a former law enforcement officer, alleges the Defendant terminated her

employment in violation of Title 42 United States Code ("U.S.C.") § 2000e *et seq.* ("Title V11"), Title 42 U.S.C. § 1981a, Title I of the Civil Rights Act of 199 1, and Chapter 760, Florida Statutes ("Florida Civil Rights Act"). The Defendant contends that the Plaintiff was properly discharged because she communicated a false report of a fire to emergency telephone operators and, when she was confronted with having filed the report, she responded untruthfully. The Plaintiff has conceded, for summary judgment purposes, that she took these actions.

The original discovery deadline was March 30, 2001. This Court, pursuant to a joint motion, extended the discovery deadline until May 4, 2001, but refused to extend the dispositive motion deadline beyond May 28, 2001 (Dkt. 21). In that Order, this Court expresaly warned the parties that no further extensions would be granted. Two days prior to the expiration of the second deadline, the Plaintiff filed a Motion to Compel (Dkt. 23) requesting that the Defendant be made to comply with specific requests for documents from her First, Second and Third Requests for Production.

The Defendant filed its Motion for Summary Judgment (Dkt. 25) on May 29,2001,[1] and the Plaintiff filed a response in opposition thereto, expresaly noting that her Motion to Compel was still pending (Dkt. 28). On July 9, 2001, the Magistrate Judge denied in part and granted in part the Plaintiff's Motion to Compel (Dkt. 33)

The Plaintiff, pursuant to both Rule 72(a), Federal Rules of Civil Procedure, and Title 28 U.S.C. § 636, timely

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[1] In accordance with Rule 6(a), May 28, 2001, was Memorial Day, which is a "legal holiday." Therefore, Defendant's Motion for Summary Judgment was timely filed.

filed an objection (Dkt. 35). Specifically, the Plaintiff seeks to have her Motion to Compel granted as to Requests No. I & 12 of her Second Request and Requests No. 1, 2, 10, 16, 18 & 19 of her Third Request.

The Magistrate Judge denied Requests No. & 12 of her Second Request on the grounds that the requests were overly broad. The Magistrate Judge found that "[w]hile the materials sought by tile Requests may include that which is the subject of proper discovery, the lack of any limitation in scope would doubtless also embody a mass of information which is not properly discoverable."

As to Requests No. 1, 2, 10 & 16 of the Third Request, the Magistrate Judge determined they were similarly overbroad. The Magistrate Judge also found that Requests No. 18 & 19 were "not sufficiently limited and could sweep far beyond the realm of relevant information."

II. Pertinent Legal Principles & Analysis

In accordance with Rule 72(a), Federal Rules of Civil Procedure, a district court shall modify or set aside any portion of the magistrate judge's order determined to be clearly erroneous or contrary to the law. In other words, the magistrate judge's order should remain undisturbed unless the district court is left with the definite and firm conviction that a mistake has been made. U.S. v. Block 44, Lots 3, 6, 177 F.R.D. 692, 693 (M.D. Fla. 1997). Furthermore, the Eleventh Circuit has held that the interests of justice sometimes require the postponement of a ruling on a summary judgment motion when the party opposing the motion has been unable to obtain responses to discovery requests. See Fernandez v. Bankers Nat'l Life Ins. Co., 906 F-2d 559 (11th Cir. 1990).

While the Court is not absolutely convinced that the Magistrate Judge's Order was clearly erroneous, the Court is left with a firm conviction that a mistake was made when the discovery requests were not reduced in scope by the Magistrate Judge. Actually, the mistake is due primarily to the parties' decision to engage in discovery games which has had the direct consequence of wasting valuable judicial resources

The Plaintiff consistently served requests for information that were clearly overbroad, and the Defendant refused to voluntarily release relevant information which should have readily been recognized as discoverable. Instead, the parties took the path of least resistance and did nothing to narrow the scope, placing the Magistrate Judge in the untenable position of having to navigate between the District Judge's stated deadlines and fairly adjudicating the extant discovery disputes.

As noted by the Court during the Pretrial Conference, this case is relatively simple. The Plaintiff alleges she was unlawfully terminated by the Defendant due to both her gender and race. The Defendant contends that the Plaintiff was fired because she: 1) violated the law by falsely reporting a fire; 2) lying about it; and 3) conduct unbecoming. In order for the Plaintiff to successfully establish a *prima facie* case of discrimination, she must show the following: 1) she is a member of a protected class; 2) she was subjected to adverse employment action; 3) her employer treated similarly situated employees, who are not members of her protected class, more favorably; and 4) she was qualified to do the job. Maniccia v. Brown, 171 F-3d 1364, 1368 (11th Cir. 1999). With regard to the third element, the Eleventh Circuit has stated that:

In determining whether employees are

> similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or acc-used of the same or similar conduct and are disciplined in different ways.... The most important factors in the disciplinary context arc the nature of the offenses committed and the nature of the punishment imposed... We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second guessing employers' reasonable decisions and confusing apples with oranges (internal citations omitted).

Id. The Plaintiff took the position at the Pretrial Conference that the comparator pool should be comprised of individuals alleged to have violated. the law, excepting misdemeanors. Such a broad category of putative comparators is not consistent with Eleventh Circuit precedent. See id.

The parties have been unable to arrive at the scope of the proper pool of comparators. The Court, upon review and consideration of the pertinent facts of this case, the contentions of the parties, and the applicable law, determines that the relevant comparator pool in this case consists of law enforcement officers who have made both: 1) false reports (e.g., false fire or police alarms/reports) which would necessarily require emergency response teams to be activated; and 2) subsequent untruthful statements made by such officer during the course of the followup investigation or inquiry.

In defining the appropriate class of comparators for this case, the Court has weighed several factors. Plaintiff s right to discover relevant evidence is obvious; however, that

is not the Court's sole consideration. In addition, the Court must consider the particular misconduct involved. The false activation of an emergency response team is more than simply a violation of Florida law; it is readily distinguishable from other crimes committed by law enforcement officials. The deliberate activation by a sworn officer of such emergency systems for improper or perverse reasons is conduct which strikes at the very foundation on which an ordered and peaceful community depends. Lying about such conduct in the resulting investigation is a significant aggravating circumstance which only heightens the egregiousness of the officer's conduct. Moreover, society demands that fire, rescue, and police response teams deliver immediate, speedy response-many times at the risk of life and limb. To compare the conceded actions of this Plaintiff to, for example, an officer who files a false travel claim or who batters a spouse is truly confusing apples with oranges.

Lastly, the Court, in drawing the line determining the scope of discovery of the files of putative comparators, must be mindful of the privacy interests of the potentially large number of persons who have absolutely no interest in or connection with this lawsuit.[2] The mere fact that their names may appear on the Internal Affairs Logs does not necessarily mean that their files should be open for inspection in an employment discrimination case such as this.

In accordance with the above determinations, the Magistrate Judge's Order, as it pertains to Request Nos. I & 12 from Plaintiff's Second Request for Production, and Request Nos. 1, 2, 10 & 16 from Plaintiffs Third Request for

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[2] The Plaintiff has listed an astounding number of witnesses (300+) in the Pretrial Stipulation (Dkt. 39) filed on July 30, 2001.

Production, shall be modified as provided, infra.

Upon consideration of the foregoing, it is ORDERED:

1. Plaintiffs Objections to Magistrate Judge's Order (Dkt. 35-1) are OVERRULED except to the extend provided as follows:

a. The Defendant is directed to conduct a search of its data base, commencing from the date that Sheriff Nathaniel Glover assumed his duties as Sheriff, and identify all law enforcement officers who have made both: 1) false reports (e.g., false fire or police alarms/reports) which would necessarily require emergency response teams to be activated and 2) subsequent untruthful statements made by such officer during the course of the following investigation or inquiry.

b. The Defendant is directed to complete its search within two weeks from the date of this Order and produce for Plaintiff s inspection the InternalA1fairs files regarding the above described category of law enforcement officers, If the outcome of the Internal Affairs' investigation cannot readily be determined from the file, the Defendant is directed to also produce for Plaintiffs inspection the necessary papers documenting such outcome, The Plaintiff shall then have until not later than September 7, 2001, within which to amend her response in opposition to Defendant's Motion for Summary Judgment.

2. Plaintiffs Motion to Stay Consideration of Summary Judgment (Dkt. 35-2) is DENIED as moot in view of the foregoing relief provided herein.

3. As a result of the foregoing, this case will be removed from the September 2001 Trial Term and

rescheduled for the November 2001 Trial Term, commencing November 5, 2001

DONE, AND ORDERED, at Jacksonville, Florida, this day 6th of August, 2001.

/s/ RALPH W. NIMMONS,
United States District Judge